2016 IL App (2d) 1610457-U
No. 2-16-0457
Order filed November 2, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF M.J.E., a minor,	)	Appeal from the Circuit Court of Du Page County.
	)	
	)	No. 15-P-969
	)	
	)	Honorable
(Wayne Borowski and Susan Borowski, Petitioners-Appellees v. Jeremy E., Respondent- Appellant).	)	Paul M. Fullerton, Robert G. Gibson, Judges, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The record establishes a lack of personal jurisdiction over respondent at the time the trial court entered the plenary guardianship order and therefore, we vacate the order as void and remand the cause for further proceedings on the petition for plenary guardianship; order vacated and cause remanded.

¶ 2 Respondent, Jeremy E., the father of M.J.E., appeals the order entered granting plenary guardianship over his daughter to her maternal grandparents, petitioners, Wayne and Susan Borowski. On appeal, respondent argues, *inter alia,* that petitioners' failure to personally serve him or otherwise notify him of the proceedings rendered the plenary guardianship order void for

lack of personal jurisdiction. We agree. We vacate the order as void and remand the cause for further proceedings on the petition for plenary guardianship.

¶ 3 I. BACKGROUND

¶ 4 On October 13, 2015, petitioners filed a *pro se* petition for guardianship of their minor granddaughter, M.J.E. The petition listed Molly Borowski as the person having custody of the minor and that it was necessary that a guardian of the minor be appointed "because the mother has substance abuse issues." The petition did not name respondent as M.J.E.'s natural father, and petitioners did not personally serve him, or otherwise provide him notice of the petition.

¶ 5 On December 8, 2015, the trial court granted petitioners plenary guardianship of M.J.E. The court-appointed guardian *ad litem* (GAL) mailed the December 8 order to respondent, who was incarcerated at the time.

¶ 6 On December 29, 2015, respondent filed a *pro se* appearance and a motion seeking sole custody of M.J.E. On March 8, 2016, counsel for respondent appeared in court and withdrew the *pro se* motion.

¶ 7 On March 22, 2016, respondent filed an emergency petition to vacate the December 8 order, or in the alternative, for revocation of the letters of office and for other relief. The petition alleged, *inter alia*, that respondent's parental rights had not been terminated, that he had been released from prison, and that he could provide a nurturing environment for M.J.E. Respondent further alleged that the petition for guardianship had failed to list him as M.J.E.'s natural father and that petitioners had failed to serve him properly and therefore, the trial court lacked personal and subject matter jurisdiction to enter the guardianship order. Respondent alleged, alternatively, that even if the court had jurisdiction to enter the December 8 order, the letters of

office should be terminated based on a material change in circumstances since that time, and that respondent should be granted "permanent possession" of M.J.E.

¶ 8 On March 23, 2016, the trial court entered an order denying the emergency petition and stating that all other orders were to remain in full force and effect. Respondent presented his emergency petition again on March 29, 2016. The trial court found the petition was not an emergency and continued the matter for hearing, granting petitioners leave to appear and answer the emergency petition.

¶ 9 Petitioners responded that they filed the petition for guardianship and did not list respondent because they believed that, since M.J.E. was living with them, they were the "nearest adult relatives of the minor." Petitioners acknowledged they knew respondent was in the penitentiary and admitted they did not personally serve respondent because they did not know where he was incarcerated. Petitioners' answer also contained numerous facts alleging respondent's unfitness to parent M.J.E.

¶ 10 The trial court denied respondent's petition to vacate the December 8 order or, in the alternative, for revocation of the letters of office. After hearing testimony, the trial court entered an order granting petitioners' motion for a directed finding. We note that respondent did not provide a transcript or substitute of the relevant hearing. Respondent timely appeals.

¶ 11 II. ANALYSIS

¶ 12 Among the arguments raised on appeal by respondent is that petitioners' failure to personally serve him or otherwise notify him of the proceedings rendered the plenary guardianship order entered on December 8 void for lack of personal jurisdiction. Petitioners first respond that respondent's brief should be stricken for violating several Supreme Court Rules. However, petitioners previously raised this motion before this court, which we denied in a

minute order on September 19, 2016. While petitioners' motion regarding the deficiencies in certain portions of respondent's appellant's brief was well-taken, our review was not substantially hindered by what is a straight-forward jurisdictional issue. Accordingly, we now turn to respondent's argument on appeal.

¶ 13 Proper service is a prerequisite for a court to acquire personal jurisdiction over a party, a dispute over personal jurisdiction presents a question of law, and rulings as to questions of law are considered *de novo*. *Jayko v. Fraczek*, 2012 IL App (1st) 103665, ¶ 3. If a party is not properly served with summons, the trial court has no personal jurisdiction over that party. In that event, a judgment entered against that party is void, even if the party is aware of the proceedings. *White v. Ratcliffe*, 285 Ill. App. 3d 758, 763-64 (1996). See also *In re Antwan L.*, 368 Ill. App. 3d 1119, 1128 (2006) (holding inadequate service of process divests the circuit court of personal jurisdiction).

¶ 14 Where a guardianship petition is filed by a nonparent, the petitioner must first establish standing. *In re R.L.S.*, 218 Ill. 2d 428, 440-41 (2006). Section 11-5(b) of the Probate Act states that the court lacks jurisdiction from proceeding to the merits of the guardianship petition if the child "has a living parent *** whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless the parent or parents consent to the appointment or, after receiving notice of the hearing under Section 11-10.1, fail to object to the appointment at the hearing on the petition." 755 ILCS 5/11-5(b) (West 2014). This standing requirement "protects the superior rights of parents and ensures that guardianship proceedings pass constitutional muster." *In re Guardianship of A.G.G.*, 406 Ill. App. 3d 389, 394 (2011) (citing *R.L.S.*, 218 Ill. 2d at 441).

¶ 15 In this case, the court awarded temporary guardianship to petitioners, appointed a GAL to interview the child and make a report, and continued the matter for hearing to December 8, 2015. Since respondent has failed to supply a transcript or an appropriate substitute of the relevant hearing, we must presume that the trial court followed the law in finding respondent unfit. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (holding that an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record, "it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis").

¶ 16 Section 11-8 of the Probate Act (755 ILCS 5/11-8 (West 2014)) requires that the petition for appointment of a guardian of the estate, or of both the person and estate, of a minor must state, if known, the names and post office addresses of the nearest relatives of the minor, including the parents. The record establishes that respondent was never served or notified of the proceedings prior to the entry of the plenary guardianship order. Petitioners never listed respondent as one of M.J.E.'s nearest relatives, as required by section 11-8, and they admitted in their answer to respondent's petition to vacate the December 8 order that they did not serve respondent. Had petitioners listed respondent in the petition, the trial court would have been on notice that there may be a service issue in the case before it had proceeded to a hearing on the merits.

¶ 17 Petitioners argue that section 11-10.1 of the Probate Act (755 ILCS 5/11-10.1 (West 2014)) allows for notice to respondent to be excused for good cause shown. Petitioners conflate notice with service. While an order entered without proper notice may be voidable, not void, and notice may be excused entirely in a probate proceeding for good cause under section 11-10.1, an

order entered against a party without jurisdiction over that party is void. *LaSalle National Trust, N.A. v. Lamet*, 328 Ill. App. 3d 729, 731-32 (2002).

¶ 18 In a related argument, petitioners claim that they established good cause for not notifying respondent. In their answer to respondent's petition to vacate, petitioners state that respondent's whereabouts were not easily ascertainable as they had no "previous experience with sentencings [*sic*] regarding state penitentiaries." This statement strains credulity where one need only access the inmate locator section on the Illinois Department of Corrections' website. Had respondent's whereabouts truly been unknown, petitioners would still be required to serve him by publication as a necessary party. See 735 ILCS 5/2-206 (West 2014). Here, petitioners made no attempt at service and even omitted any reference to him as M.J.E.'s father in the guardianship petition.

¶ 19 Petitioners last argue that, even if service was initially inadequate, respondent's subsequent appearance, the filing of pleadings, and his participation in court proceedings submitted him to the jurisdiction of the court. We disagree. Respondent's appearance only waives the issue of service and personal jurisdiction prospectively, not retroactively. *In re Jamari R.*, 2016 IL App (1st) 160850, ¶ 54 (citing *In re M.W.*, 232 Ill. 2d 408, 414 (2009)).

¶ 20 The Probate Act makes clear that a parent is a necessary party in a guardianship petition. Clearly, as M.J.E.'s natural father, respondent has the superior right of a parent who would be materially affected by a judgment entered in his absence. In sum, the trial court had no personal jurisdiction over respondent due to petitioners' failure to serve notice of the guardianship petition to respondent and therefore, the plenary guardianship order entered in favor of petitioners is void and must be vacated.

¶ 21 III. CONCLUSION

¶ 22 Because the record establishes a lack of personal jurisdiction over respondent at the time the trial court entered the December 8, 2015, plenary guardianship order, we vacate that order as void and remand the cause for further proceedings on the petition for guardianship.

¶ 23 Order vacated and cause remanded.